Petition

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No. 81-1512

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EARL B. DOWDLE, Superintendent,
Safford Conservation Center; and
Attorney General, State of
Arizona,

Petitioners,

vs.

EMIL THOMPSON WRIGHT,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals violate U.S. v. Timmreck in granting relief when the habeas corpus petitioner never alleged that he did not know what he was giving up by pleading guilty, or that he would not have pleaded guilty had he been properly instructed by the trial judge?

II. Did the Court of Appeals err in putting the burden on the State to prove that Wright's guilty plea was valid when it was Wright's own dilatory conduct which both created the doubt about the plea and hampered the State in reconstructing what had occurred at the change of plea hearing?

III. Did the Court of Appeals arrive at an erroneous assessment of the case through wilfull disregard of pertinent evidence and refusal to give due deference to the findings of the state court?

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II. It was Wright's dilatory conduct in causelessly waiting six years to attack his conviction which allowed the reporter's notes to become lost, and which rendered it virtually impossible for the State to prove the validity of the plea, so the Court of Appeals should not have placed the burden of proof on the State. 13

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The decisions of all the courts considering this case, both state and federal, have been by minute entry, order, or Memorandum, rather than by formal Opinion. Therefore, there are no published reports. The decisional documents are reproduced in the Appendices to this Petition.

JURISDICTION OF THIS COURT

A three-judge panel of the Ninth Circuit Court of Appeals filed its Memorandum decision, reversing and remanding the District Court's denial of a petition for habeas corpus relief, on August 19, 1981. A Petition for Rehearing and request for rehearing en banc was timely filed by mailing it on August 31, 1981. The Petition for Rehearing was denied by an Order filed December 8, 1981, no judge having requested a vote on the suggested hearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2241.

(c) The writ of habeas corpus shall not extend to a prisoner unless --

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2254.

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or

treaties of the United States.

* * *

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court pro-

ceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

STATEMENT OF THE CASE

Emil Thompson Wright murdered one man and blinded another by shooting him in the head, on January 22, 1970, near Tucson, Arizona. He was not apprehended until January 1971, when he was arrested in New York. After being returned to Arizona he pleaded guilty to first degree murder on May 21, 1971, waived the statutory period of waiting before sentence could be imposed, and was immediately sentenced to life imprisonment. Though he was advised of his appeal rights, he filed no appeal.

Nothing further happened in the case until 1977, when Wright requested to know the cost of a copy of the transcript of the hearing in which he changed his plea to guilty; the trial judge directed the court reporter to inform him of the cost, by minute entry dated July 27, 1977. Whether there was further communication is not known; the next activity occurred in August 1978 when Wright filed a pro se application for writ of habeas

corpus in the Arizona Supreme Court, claiming that he had entered his guilty plea "without the trial court having first made a determination of voluntariness and intelligence of the plea," and that no one would provide him with a transcript of the hearing. The Supreme Court referred the matter to the Pima County Superior Court to be handled under the provisions for post-conviction relief, Arizona Rule of Criminal Procedure 32. On October 23, 1978 the court reporter was ordered to prepare a transcript of the change of plea hearing and provide it to Wright's new defense counsel, but on November 3, 1978 the reporter filed an affidavit stating that despite some 36 hours spent searching his notes, he was unable to locate the notes of the hearing. After several delays caused by scheduling problems, an evidentiary hearing was held in Pima County Superior Court on February 16, 1979. At the hearing all of the legal personnel involved in the case testified; Wright did not, but stipulated that his testimony would simply be the contents of a

previously submitted affidavit. (Appendix 1.)

Wright's former defense counsel, Gilbert Veliz (who had himself been elevated to the trial bench) testified that he had no specific recollection of what the trial judge (John Collins) had said to Wright during the change of plea hearing, and that he had not himself specifically gone over with Wright a list of the rights that he would be giving up in pleading guilty. However, he believed that Wright was told everything he was supposed to be told at the hearing, and that the plea was knowing, intelligent, and voluntary. Supporting this conclusion were many factors:

1. Veliz had discussed the strong evidence possessed by the prosecutor with his client and Wright had called him up saying, "Save my life." (R.T. Feb. 16, 1979 at 36-40.)

2. He had discussed the right to a jury trial. (Id. at 12-13.)

3. He had discussed with Wright his right to testify and to refrain from testifying. (Id. at 14-15.)

4. He had informed him of his right to subpoena witnesses. (Id. at 26.)

5. Wright had actually seen his right to confront and cross-examine adverse witnesses in action, because that was done in his presence at a lengthy preliminary hearing. (Id. at 13, 18, 39.)

6. Wright had been told what the probable length of his actual imprisonment was likely to be if he received a nominal life sentence. (Id. at 15.)

7. Wright was specifically seeking a life sentence. (Id. at 15-16.)

8. Veliz had seen no evidence of mental problems in Wright and had no indication of problems with drugs. (Id. at 14, 44.)

The court reporter testified that he had no particularized recollection of Wright or that hearing. However, having worked in Judge Collins' court on numerous occasions, he could say that Collins was so thorough that his change of plea hearings generally ran at least half an hour in length, and that he sometimes would even cover some of the rights being

waived more than once. (Id. at 53, 59.) The prosecutor stated that because the warnings required by Boykin v. Alabama, 395 U.S. 238 (1969) were then still relatively new and unfamiliar, the deputy county attorneys were all specifically under responsibility to keep track of the judges and make sure that Boykin was fully complied with. As a result, he specifically recalled going down a mental checklist at the hearing, and being satisfied at the end of it that everything needful had been covered. (R.T. Feb. 16, 1979 at 82-83, 86.) Finally, Judge Collins stated that he was fully aware of the Boykin requirements, that he always tried to protect the individual's rights, and that he would have been especially careful in a case of this sort. (Id. at 65-67.)

After the hearing was finished the trial judge denied Wright's petition for post-conviction relief. He concluded that, while he could not find from the testimony that Collins had advised Wright in court of his

constitutional rights, the evidence as a whole (especially that from the defense counsel) showed that Wright was aware of the rights he was giving up, and that the plea was made knowingly, voluntarily, and intelligently. (Minute Entry, March 6, 1979, Appendix 2.) Wright then exhausted his state remedies by filing a motion for rehearing with the Superior Court and a Petition for Review with the Arizona Supreme Court, both of which were denied. He then filed a habeas corpus petition in the federal District Court, but the petition was denied. The District Court judge found that "Petitioner was aware of and informed of his constitutional rights", and that the state court finding that Wright's plea was knowing, voluntary, and intelligent was fairly supported by the record. (Appendix 3.) Wright then appealed to the Ninth Circuit which reversed, holding that the findings were <u>not</u> supported by the record of the evidentiary hearing. (Appendix 4.) It is this conclusion which Petitioners desire

this Court to review and reverse.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS GRANTED RELIEF IN CIRCUMSTANCES WHICH CLEARLY DO NOT CONSTITUTE GROUNDS COGNIZABLE IN HABEAS CORPUS, THEREBY REJECTING THE PLAIN TEACHING OF THE HABEAS CORPUS STATUTES, ITS OWN PRECEDENTS, DECISIONS IN OTHER FEDERAL COURTS OF APPEALS, AND THIS COURT'S DECISION IN U.S. v. TIMMRECK.

It is fundamental that there is a remedy by way of habeas corpus only when a person is in custody "in violation of the Constitution or laws or treaties of the United States". 28 U.S.C. §§ 2241(c)(3) and 2254(a). As a matter of simple logic a person cannot be wrongfully in custody within the contemplation of these statutes if the alleged trial errors had no effect on the outcome of the proceedings; if the conviction and resultant custody derive only from legitimate legal processes, the fact that errors of some sort may have occurred along the way is irrelevant, and habeas corpus will not lie. This plain and irrefutable logic was applied by this Court in United States v. Timmreck, 441 U.S. 780 (1979)

in holding that a defendant who claimed there were errors in his guilty plea proceeding was entitled to no collateral relief under 28 U.S.C. § 2255:

> In Hill v. United States, 368 U.S. 424, the Court was presented with the question whether a collateral attack under § 2255 could be predicated on a violation of Fed. Rule Crim. Proc. 32 (a), which gives the defendant the right to make a statement on his own behalf before he is sentenced. The Court rejected the claim, stating:
>
> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' Bowen v. Johnston, 306 U.S. 19, 27. See Escoe v. Zerbst, 295 U.S. 490; Johnson v. Zerbst, 304 U.S. 458; Walker v. Johnston, 312 U.S. 275; Waley v. Johnston, 316 U.S. 101." 368 U.S., at 428.

The reasoning in Hill is equally applicable to a formal violation of Rule 11. Such a violation is neither constitutional nor jurisdictional: the 1966 amendment to Rule 11 obviously could not amend the Constitution or limit the jurisdiction of the federal courts. Nor can any claim reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the rule. That claim could have been raised on direct appeal, see McCarthy v. United States, 394 U.S. 459, but was not. And there is no basis here for allowing collateral attack "to do service for an appeal." Sunal v. Large, 332 U.S. 174, 178.

Indeed, if anything, this case may be a stronger one for foreclosing collateral relief than the Hill case. For the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.

"Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is great-

> est when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." United States v. Smith, 440 F.2d 521, 528-529 (Stevens, J., dissenting).
>
> 441 U.S. at 783-784 (emphasis added, footnotes omitted).

This case is virtually on all fours with Timmreck. Wright never took a direct appeal, but waited until years later to stage a collateral attack on his guilty plea. In none of the pleadings or documents submitted by Wright personally has he ever suggested that his guilty plea was involuntary, that he did not understand the rights he was waiving in pleading guilty, or that he would not have pleaded guilty had he been properly informed and catechized about the waivers.[1] For

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1 A statement was made in the Opening Brief submitted to the Ninth Circuit on Wright's behalf by the Federal Public Defender that "Boykin never asserted his plea was coerced or in ignorance of the consequences. Petitioner Wright does make those allegations..." (Opening Brief at 14). However, this statement is contrary to everything else ever filed in the case, cites no facts, and is unsupported by anything in the record, and so is evidently nothing more than zealous but inaccurate rhetoric.

example, the affidavit which constitutes his stipulated testimony at the state court evidentiary hearing (reproduced in toto as Appendix 1 to this Petition) simply alleges that

> thereafter, on May 22, 1971, upon advice of counsel, he entered a plea of guilty to the charge of first degree murder; that, at no time, did the court discuss the facts of the case with the affiant nor did the court advise the affiant that he had the right to plead not guilty, to have a jury trial, to appeal any conviction, to have an attorney appointed to represent him throughout all stages of the proceedings, nor of any other constitutional right; that the court simply asked the affiant his name, stated the nature of the charge, asked if the affiant was entering a plea of guilty, and sentenced the affiant to life imprisonment.

It is therefore clear that Wright has never presented any claim which is properly cognizable in habeas corpus. A variety of Federal and state courts, including the Ninth Circuit, have relied on Timmreck to deny relief in similar circumstances. See U.S. v. Horsley, 599 F.2d 1265 (3rd Cir. 1979); U.S. v. Ackerman, 619 F.2d 285 (3rd Cir. 1980); U.S. v. Crook, 607 F.2d 670 (5th Cir. 1979); U.S. v.

Salas, 602 F.2d 215 (9th Cir. 1979); Wacht v. Cardwell, 604 F.2d 1245 (9th Cir. 1979); People v. Wright, 96 Cal. App.3d Supp. 17, 158 Cal. Rptr. 275, fn. 1 (1979); People v. Coultas, 75 Ill. App.3d 137, 394 N.E.2d 26 (1979); State v. Rouse, 206 Neb. 371, 293 N.W.2d 83 (1980). There was, moreover, no excuse for the Court of Appeals to ignore Timmreck in dealing with this case; that decision was alluded to in the briefs and discussed during oral arguments, and yet was never even mentioned in the Court of Appeals Memorandum.

The bottom line is that the Court of Appeals has ignored and contradicted a clearly controlling precedent from this Court, thereby encouraging "anarchy to prevail within the federal judicial system." Hutto v. Davis, 50 U.S.L.W. 3540 (U.S., Jan. 11, 1982). This of itself is reason enought for this Court to grant the Petition, but it should also be noted that the decision also creates a conflict with decisions of other circuits, as well as with prior decisions in the Ninth Circuit, and effectively renders meaningless

the portions of 28 U.S.C. §§ 2241 and 2254 cited above. See Supreme Court Rule 17.1. The application of this Court's guiding hand is sorely needed in this case.

II. IT WAS WRIGHT'S DILATORY CONDUCT IN CAUSELESSLY WAITING SIX YEARS TO ATTACK HIS CONVICTION WHICH ALLOWED THE REPORTER'S NOTES TO BECOME LOST, AND WHICH RENDERED IT VIRTUALLY IMPOSSIBLE FOR THE STATE TO PROVE THE VALIDITY OF THE PLEA, SO THE COURT OF APPEALS SHOULD NOT HAVE PLACED THE BURDEN OF PROOF ON THE STATE.

This Court has made it clear for many years that habeas corpus is an essentially equitable remedy, to be administered in accordance with the general principles of equity.

> Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.
>
> Fay v. Noia, 372 U.S. 391, 438 (1963).

One such principle is the doctrine of laches, which precludes a party from resting on his rights so long that the delay causes disadvantage to an opposing party. A dozen years ago this Court intimated its disapproval of stale collateral attacks on convictions,

especially those based on guilty pleas. See McMann v. Richardson, 397 U.S. 759, 773-774 (1970). The doctrine of laches has since been incorporated into the Rules Governing Section 2254 Cases, in Rule 9:

> (a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

That this Rule was designed to cover just such a case as the one now before us is made clear by the Advisory Committee Note:

> The assertion of stale claims is a problem which is not likely to decrease in frequency. Following the decisions in Jones v. Cunningham, 371 U.S. 236 (1963), and Benson v. California, 328 F.2d 159 (9th Cir. 1964), the concept of custody expanded greatly, lengthening the time period during which a habeas corpus petition may be filed. The petitioner who is not unconditionally discharged may be on parole or probation for many years. He may at some date, perhaps ten or fifteen years after conviction, decide to challenge the state court judgment. The grounds most often troublesome to the courts are ineffective counsel, denial of right of appeal, plea of

> guilty unlawfully induced, use of a coerced confession, and illegally constituted jury. The latter four grounds are often interlocked with the allegation of ineffective counsel. When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are. It often develops that the defense attorney has little or no recollection as to what took place and that many of the participants in the trial are dead or their whereabouts unknown. The court reporter's notes may have been lost or destroyed, thus eliminating any exact record of what transpired. If the case was decided on a guilty plea, even if the record is intact, it may not satisfactorily reveal the extent of the defense attorney's efforts in behalf of the petitioner. As a consequence, there is obvious difficulty in investigating petitioner's allegations.

There can be no doubt that Arizona has been profoundly prejudiced in its attempts to defend against Wright's claims. There having been no appeal or any other action on the case for six years after the conviction on May 21, 1971, there was no reason for the court reporter to transcribe his notes and they were apparently lost. Memories faded, to the point where the participants had rela-

tively little recollection of precisely what words had been spoken at the change of plea hearing. To the extent that the post-conviction evidentiary hearing may be found insufficient to prove the validity of the guilty plea (which the Ninth Circuit held to be the situation, but which Petitioners deny), the fault obviously lies with Wright, whose dilatory conduct has made preparation of a complete record impossible.

In similar circumstances cases from a majority of the circuits, including the Ninth Circuit, have given substantial weight to a habeas corpus petitioner's lack of diligence, holding that it will put the burden of proof on him, or even be grounds for dismissing the petition. See Pasley v. Overholser, 282 F.2d 494 (D.C. Cir. 1960); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979), cert. denied 446 U.S. 985; United States ex rel. Darrah v. Brierley, 415 F.2d 9 (3rd Cir. 1969); Mayola v. Alabama, 623 F.2d 992 (5th Cir. 1980); Clayton v. Blackburn, 578 F.2d

117 (5th Cir. 1978); Bellew v. Gunn, 532 F.2d 1288 (9th Cir. 1976), cert. denied 426 U.S. 953; Gallegos v. Cox, 358 F.2d 703 (10th Cir. 1966), cert. denied 385 U.S. 869; Annot., "Delay as affecting right to coram nobis attacking criminal conviction," 62 A.L.R.2d 432. These holdings seem particularly appropriate in light of this Court's own decision in Norvell v. Illinois, 373 U.S. 420, 423 (1963):

> We do not say that petitioner, having had a lawyer, could be found to have waived his rights on appeal. We only hold that a State, in applying Griffin v. Illinois to situations where no transcript of the trial is available due to the death of the court reporter, may without violation of the Due Process or Equal Protection Clause deny relief to those who, at the time of the trial, had a lawyer and who presumably had his continuing services for purposes of appeal and yet failed to pursue an appeal.

See also United States v. MacCollom, 426 U.S. 317 (1976), which held that a federal defendant's intentional decision to forego direct appeal and the automatic provision of a trial transcript places him "in a different position" when he later seeks a transcript for a colla-

teral attack on the conviction -- "The basic question is one of adequacy of respondent's access to procedures for review of his conviction... and it must be decided in light of avenues which respondent chose not to follow as well as those he now seeks to widen." 426 U.S. at 326.

The Ninth Circuit totally ignored both Rule 9(a) and this array of caselaw, which clearly places the burden of proof on the habeas corpus petitioner when his unexplained delay prejudices the state's ability to defend against his claims. Instead, they relied on two cases in which no questions of prejudicial delay were either raised or considered, United States v. Pricepaul, 540 F.2d 417 (9th Cir. 1976), and Roddy v. Black, 516 F.2d 1380 (6th Cir. 1975). (See Appendix 4 at 2.) In so doing they have not only decided wrongly, they have at least tacitly rejected Rule 9(a), created a conflict within the Ninth Circuit about the proper allocation of burden of proof in the circumstances of

cases like this one, and placed themselves contrary to a substantial body of decisions in other circuits. That the decision renders one of the major safeguards against the whelming flood of post-conviction litigation a dead letter, while at the same time creating a substantial conflict with decisions from the other circuits, is sufficient reason for this Court to review it. Supreme Court Rule 17.1. While the damage done may seem to be mitigated somewhat by the fact that this is an unpublished decision, that is actually indicative of the need for this Court to take action. A published opinion exposes erroneous reasoning to constructive criticism, which may lead to its correction, but an unpublished decision is like the proverbial victim of medical malpractice -- the Court of Appeals has effectively buried its mistake. Moreover, given the huge number of habeas corpus petitions filed annually, many of which surface years after the trial, this is a recurring issue of real importance to the administration of justice. This Court should therefore agree

to review it.

III. THE COURT OF APPEALS PLAINLY ERRED IN ITS ASSESSMENT OF THE CASE BY DISREGARDING PRESUMPTIONS FAVORING THE STATE, IGNORING EVIDENCE SUPPORTING THE STATE'S POSITION, AFFORDING NO DEFERENCE TO THE FINDINGS OF THE STATE COURT, AND ENGAGING IN GROUNDLESS SPECULATION ABOUT WHAT WRIGHT MIGHT HAVE BELIEVED ABOUT HIS CHANGE OF PLEA.

The Court of Appeals concluded that it was free to disregard the state court's conclusion that Wright knew what he was giving up by his guilty plea, based on its determination that the finding was not fairly supported by the record. However, to arrive at this conclusion the Court of Appeals had to radically distort the decision-making process by casting aside numerous factors supporting the position which was advocated by the State and which was found to be true by the state court and the District Court. To begin with, it must be recalled that Wright was represented by counsel, and that at no time has there ever been the slightest suggestion that that lawyer (who has since been elevated to the trial bench) was anything less than completely

competent and effective. "[T]he universal policy in federal habeas corpus is that a plea of guilty entered on the advice of defense counsel is presumptively valid." A. Bishop, "Federal Habeas Corpus in State Guilty Pleas," 71 F.R.D. 235, 272 (1976). Support for this generalization can be found in this Court's trilogy of guilty plea cases, McMann v. Richardson, supra, Parker v. North Carolina, 397 U.S. 790, and Brady v. United States, 379 U.S. 742 (1970). See United States ex rel. Grays v. Rundle, 428 F.2d 1401 (3rd Cir. 1970). "It is clear from these cases that even on a silent record, if a petitioner was represented by counsel when he entered his plea of guilty, as is the case here, the presumption is that the plea was the voluntary product of an intelligent and knowing act." United States ex rel. Black v. Russell, 435 F.2d 546, 547 (3rd Cir. 1970), cert. denied 402 U.S. 947 (1970); see also Grantling v. Balkcom, 632 F.2d 1261 (5th Cir. 1980); Winford v. Swenson, 517 F.2d 1114 (8th Cir. 1975), cert. denied 423 U.S. 1023; and Bellew v. Gunn,

supra. Thus, even absent the facts developed at the post-trial hearing, the Court of Appeals should have presumed the guilty plea valid, but no mention of such a presumption appears in the Memorandum, so it evidently was not applied.

Next, it must be noted that nowhere in the Memorandum did the Court of Appeals take note of the available evidence regarding habit and custom as it related to those matters where the specific memories of the participants had dimmed. Such evidence is allowed, even without corroboration, by both Federal Rule of Evidence 406 and its identical Arizona counterpart. Numerous federal and state courts have considered such evidence in dealing with precisely the sort of issue presented by this case. See, e.g., Alessi v. United States, 628 F.2d 1133 (2nd Cir. 1980); Bouchillon v. Estelle, 628 F.2d 926 (5th Cir. 1980); Webster v. Estelle, 505 F.2d 926 (5th Cir. 1974), cert. denied 421 U.S. 918; Wilson v. Wiman, 386 F.2d 968 (6th Cir. 1967), cert.

denied 390 U.S. 1042; Bellew v. Gunn, supra; In re Johnson, 53 Cal Rptr. 1 (App. 1966); McIntyre v. Balkcom, 229 Ga. 81, 189 S.E.2d 445 (1972); Wilson v. State, 159 S.E.2d 282 (So. Car. 1968). Cf. United States v. Timmreck, supra, 441 U.S. at 782.

This is a very substantial point, because there was considerable testimony at the state evidentiary hearing about the habitual thoroughness of the judge involved when it came to accepting guilty pleas. The court reporter testified that even Judge Collins' short change of plea hearings usually took at least half an hour, that he specifically recalled the judge referring during plea changes to the right to remain silent and the right to trial (two of the matters troublesome to the Court of Appeals),and that the judge was thorough to the point of sometimes covering the same matter twice. (R.T. Feb. 16, 1979 at 53-54, 59.) The judge himself testified to his awareness of the requirements of Boykin, that he always did everything he could to protect the rights of the individual, and that he

would have been even more careful than usual in taking a plea in a first degree murder case. (Id. at 63-68.) The prosecutor stated that he was always careful to insure that all the Boykin requirements were covered in guilty pleas, especially around the time of the plea in question because Boykin was still new enough to be a source of numerous appeals, and that he distinctly recalled going down a mental checklist at this particular change of plea, and being satisfied that everything had been properly covered. (Id. at 82-83.) He also corroborated the other witnesses on Judge Collins' customary thoroughness. (Id. at 84.) The defense counsel likewise testified that the judge had covered everything, and that Wright's plea was a voluntary, intelligent plea. (Id. at 21-26.) Given the case law noted above, this testimony from the court personnel who participated in the change of plea may not have been by itself a sufficient basis for concluding that Wright knew what he was waiving, but it should certainly have been given some consideration. The Court of Appeals

apparently ignored it completely.

Third, it is apparent that the Court of Appeals gave insufficient consideration to the findings of the state court, and the conclusions it reached after an extensive evidentiary hearing. Whether a guilty plea is knowing, intelligent and voluntary is a question of fact. United States ex rel. Crosby v. Brierly, 404 F.2d 790 (3rd Cir. 1968); Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973); Bellew v. Gunn, supra; Brady v. United States, 404 F.2d 601 (10th Cir. 1968), aff'd 397 U.S. 742. As such, it is the sort of question where the determination made by the state court is presumed correct. Sumner v. Mata, ___U.S.___, 101 S.Ct. 764 (1981); 28 U.S.C. § 2254(d). The Ninth Circuit refused to apply that presumption, concluding that the state court findings were not supported by the record. When the specifics of the rejection are examined, however, it becomes plain that the Court of Appeals was analyzing the question in a manner which was hyper-technical in the extreme. The Memorandum

(Appendix 4 at 2) states that Wright's defense counsel "did not testify that he advised his client of his right not to testify", and suggests that Wright "might well have believed" the state could force him to take the stand. However, the defense lawyer did testify as follows:

> Q. Did you ever discuss the potential for him taking the witness stand in his own defense?
>
> A. Yes, sir.
>
> Q. And also the potential for him not taking the witness stand?
>
> A. The situation as I saw it, and I conveyed to him, was as follows: As I recall, he had two felonies.
>
> Q. Are those prior felony convictions?
>
> A. Yes. Yes, sir. And he had been just paroled immediately prior to coming to Arizona, as I recall the facts, so he had been -- and he was in violation of his parole in California, but he had two felonies, and we discussed the fact that he could be impeached by taking the stand with the two felonies. (R.T. Feb. 16, 1979 at 14.)

The only reasonable interpretation of this exchange is that the lawyer told Wright he had the option to testify or not testify, but that taking the stand would allow him to be

impeached by his prior convictions during cross-examination. The suggestion that he might have believed he could be compelled to take the stand is baseless conjecture, without any foundation in the record, not even from the affidavit which was stipulated to as constituting what Wright's testimony would have been if he had testified at the evidentiary hearing. (Appendix 1 to this Petition.) After all, Wright had been present at a lengthy preliminary hearing where the state presented its case against him; logically, if the prosecutor could have forced him to testify, he would have done it then, but of course no such compulsion was exercised. Thus, Wright had to be aware of his privilege to refrain from testifying.

The same sort of situation exists with regard to the Court of Appeals' second objection, that there was a possibility Wright might have thought the state would decide whether or not there should be a jury trial. The defense lawyer testified:

Q. Okay. Now, Judge, without telling me anything that Mr. Wright told you about his possible involvement in the crime itself, did you discuss with him prior to arriving at the decision to take this plea agreement about the potential of going to trial on this case, potential success by taking this in front of the jury?

A. Yes. Yes, sir.

Q. And did you explain to him or discuss with him the fact that a jury might acquit him?

A. Yes, sir. In the context of the evidence that we -- that I was gathering -- in other words, we had a day. In those days you didn't have the discovery that we have now. After the preliminary hearing, wherein Emil was there, I made some motions and there was other evidence that was made available to me. Every time I would get something new I would go and show it to Mr. Wright, and we would discuss its implications and things of that type.
(R.T. Feb. 16, 1979 at 12-13.)

The phrase "taking this in front of the jury" clearly indicates a volitional act, optional to the defense, and the defense lawyer accepted the terminology, adding that he discussed the implications of <u>every</u> new development in the case with Wright. This refutes the Ninth Circuit suggestion as to what he

"could have inferred", which again is merely groundless conjecture.

Finally, as to the right to confront witnesses (Memorandum at 2.) The Court of Appeals acknowledged that Wright had been present at the preliminary hearing, and had seen his counsel cross-examine the adverse witnesses, but without a scintilla of cause hypothesized that he could have believed some other rule applied at trial. It is utterly illogical to believe that a right to confrontation would apply at a mere probable cause hearing but not exist at the actual trial. Wright knew that witnesses would be cross-examined at trial because his lawyer had warned how he could himself be impeached with his prior convictions. Moreover, the lawyer discussed with Wright what their approach would be as to each witness against him. (R. T. Feb. 16, 1979 at 38-39). It is simply unthinkable that such discussions would not have included cross-examination, especially with Wright being so alert and so suspicious that he insisted on personally examining the

lawyer's file every time he visited him. (Id. at 33.)

In sum, the Court of Appeals' decision is based upon an unreasonably and unsupportably rigid analysis. The law does not require the sort of recitation of magic words that court seems to be demanding; the Ninth Circuit itself made clear long ago that specific articulation of the Boykin rights is not necessary so long as the understanding is present. Wilkins v. Erickson, 505 F.2d 761 (9th Cir. 1974). See also Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972); McChesney v. Henderson, 482 F.2d 1101 (5th Cir. 1973), cert. denied 414 U.S. 1146; Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973). This Court has recently condemned similar hair-splitting in the context of Miranda rights waivers. California v. Prysock, ___U.S.___, 101 S.Ct. 2806 (1981). The Court of Appeals should have analyzed this case with reasonableness, with deference to the state court's findings, mindful of the presumption of validity which attached because Wright was represented by competent counsel,

and paying heed to Wright's unexplained, prejudicial delay in seeking relief. If all of those factors had been properly weighed, the trial court and the District Court would have been affirmed, and the Court of Appeals' failure to do so is a gross abuse of judicial authority, which cries out for supervisory action by this Court.

CONCLUSION

The Court of Appeals granted Emil Wright habeas corpus relief when there was no basis in law to do so, and in utter disregard of a dispositive decision by this Court; it trampled on the rules of equity which underlie habeas corpus by misallocating the burden of proof; and it arrived at a demonstrably wrong conclusion by neglecting to take proper account of either the presumptions and deference favoring the state, or

the actual evidence adduced. This Court should grant the present Petition and reverse the Court of Appeals, in order to correct such wanton misuse of judicial authority.

Respectfully submitted,

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The Attorney General

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

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Counsel of Record

Appendix

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

EMIL T. WRIGHT, having been first duly sworn upon his oath, deposes and states:

That he is the defendant in that certain criminal caused denominated No. A-18997 in the Superior Court of the State of Arizona, in and for the County of Pima; that he was originally arrested on January 7, 1971, in the State of New York, pursuant to a warrant issued in the State of Arizona; that he was returned to the State of Arizona on January 8, 1971; that, thereafter, on May 22, 1971, upon advice of counsel, he entered a plea of guilty to the charge of first degree murder; that, at no time, did the court discuss the facts of the case with the affiant nor did the court advise the affiant that he had the right to plead not guilty, to have a jury trial, to appeal any conviction, to have an attorney appointed to

represent him throughout all stages of the proceedings, nor of any other constitutional right; that the court simply asked the affiant his name, stated the nature of the charge, asked if the affiant was entering a plea of guilty, and sentenced the affiant to life imprisonment.

"/S/ EMIL T. WRIGHT"
EMIL T. WRIGHT

SUBSCRIBED AND SWORN TO before me this 6th day of November, 1978, by Emil T. Wright.

"/S/ THARY C. HARTZLER"
NOTARY PUBLIC

My Commission Expires:

July 8, 1980

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

HARRY GIN, Judge NO. A-18997

DATE March 6, 1979

STATE OF ARIZONA,

Plaintiff,

EMIL THOMPSON WRIGHT,

Defendant.

MINUTE ENTRY

UNDER ADVISEMENT:

IT IS ORDERED that Defendant's Petition for Post Conviction Relief is DENIED.

The Court cannot conclude from Judge Collins' and his Court Reporter's testimony that Defendant was advised of his constitutional rights at the Change of Plea because it was Judge Collins' habit to do so, but it is clear from Judge Veliz's testimony, and Defendant's prior record, that Defendant was aware of his constitutional rights when he pled guilty and

must conclude that his plea was knowingly, voluntarily and intelligently made.

cc:

County Attorney (Dan Smith)

Lieberthal & Kashman

Under Advisement Clerk

Court Admin.

Judge Gin

JAMES N. CORBETT, Clerk

By "/s/Carolyn Brittain"
Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

EMIL THOMPSON WRIGHT,	)	
	)	
Petitioner,	)	No. CIV 79-270-TUC-MAR
	)	
vs.	)	
	)	ORDER
EARL B. DOWDLE, Superintendent, S.C.C.,	)	
	)	
	)	
Respondent.	)	
	)	

Petitioner has filed a petition for writ of habeas corpus pursuant to Title 28 U.S.C. § 2254. This petition was filed with the Clerk of the United States District Court for the District of Arizona at Tucson, Arizona. The Attorney General of the State of Arizona has responded on behalf of Earl B. Dowdle, Superintendent, Safford Conservation Center.

Petitioner claims entitlement to relief on two grounds: (1) The trial court failed to determine that the petitioner voluntarily, knowingly, and intelligently entered a guilty plea; and (2) he is being denied access to the

courts by the loss or destruction of his trial proceedings.

May 21, 1971, petitioner pursuant to a plea bargain agreement entered a plea of guilty to the charge of first degree murder. This plea was in Cause No. A-18997 in the Superior Court of the State of Arizona, in and for the County of Pima. Petitioner was sentenced at the time of his change of plea. He was sentenced to a term of life imprisonment. It should be noted that as part of the plea agreement a pre-sentence report had been prepared and submitted to the sentencing judge.

Petitioner did not appeal from the judgment and sentence. In 1978, petitioner filed a petition for writ of habeas corpus with the state court. An attorney was appointed to represent petitioner. It was determined that the court reporter's notes of the change of plea were lost. An evidentiary hearing was held February 16, 1979. March 6, 1979, the

trial court denied the petition for post conviction relief and ruled that petitioner was aware of his constitutional rights when he pled guilty and concluded that the plea was knowingly, voluntarily and intelligently made. A motion for rehearing was filed and denied. A petition for review was filed and denied by the Arizona Supreme Court on September 10, 1979.

Title 28 U.S.C. § 2254(d) provides in part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties,

> evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, ...

The statute further provides that the burden is on the petitioner to establish by convicing evidence that the factual determination by the state court was erroneous.

The Court has before it a transcript of the evidentiary hearing held by the state court pursuant to Rule 32.8, Arizona Rules of Criminal Procedure. A review of this transcript supports the state court's ruling that petitioner's plea was knowing, voluntary and intelligently entered. Petitioner was aware of and informed of his constitutional rights.

This Court, of course, could hold an evidentiary hearing, however, the same is not necessary. See, e.g., Wilkins v. Erickson, 505 F.2d 761 (9th Cir. 1974). Petitioner was given a full an fair opportunity to litigate

his claim before the state court. The record of the state court proceedings fairly supports the factual and legal conclusion of the state courts.

IT IS ORDERED that the petition for writ of habeas corpus is denied and the same is dismissed.

IT IS FURTHER ORDERED that the Clerk mail a copy of this Order to petitioner and to the attorney for respondents.

DATED: March 5, 1980

"/s/ MARY ANNE RICHEY"

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EMIL THOMPSON WRIGHT,
Petitioner-Appellant,

vs.

EARL B. DOWDLE, Superintendent; ATTORNEY GENERAL, State of Arizona,
Respondents-Appellees.

No. 80-5285
D.C. No. CIV 79-270 TUC-MAR
MEMORANDUM

Argued and Submitted — March 10, 1981

Decided — August 19, 1981

Appeal from the United States District Court
for the District of Arizona
Mary Anne Richey, District Judge, Presiding

Before: FLETCHER and POOLE, Circuit Judges, and CLAIBORNE,* District Judge.

Ten years ago, Wright pled guilty in state court to one count of first degree murder. He now petitions for a writ of habeas corpus under 28 U.S.C. § 2254, claiming that his plea was not knowing and voluntary. The district court denied his petition. We reverse and remand for an evidentiary hearing.

Wright claims that his plea was not voluntary under the rule of *Boykin v. Alabama*, 395 U.S. 238 (1969), because he was not advised of his privilege against compulsory self-incrimination, his right to trial by a jury, and his right to confront his accusers. Since the transcript of Wright's plea hearing has been lost, Wright's conviction must be reversed unless it can be shown at a post-conviction evidentiary hearing that Wright knew of his *Boykin* rights. *United States v.*

*The Honorable Harry E. Claiborne, United States District Judge for the District of Nevada, sitting by designation.

Pricepaul, 540 F.2d 417, 422 (9th Cir. 1976); *Wilkins v. Erikson*, 505 F.2d 761, 765 (9th Cir. 1974); *Roddy v. Black*, 516 F.2d 1380, 1384 (6th Cir. 1975); *Walker v. Caldwell*, 476 F.2d 213, 215 n. 1 (5th Cir. 1973). Moreover, the government has the burden of proving that the waiver was voluntary and was intelligently made. *Pricepaul*, 540 F.2d at 423; *Roddy*, 516 F.2d at 1384 & n. 5.

The district court did not hold an evidentiary hearing. Instead, it concluded that the record of the evidentiary hearing on Wright's state habeas corpus petition "supports the state court's ruling that petitioner's plea was knowing, voluntary, and intelligently entered." *See* 28 U.S.C. § 2254(d)(8).

We cannot agree with the district court's conclusion. The state court took testimony from Wright's defense attorney, the prosecuting attorney, the court reporter, and the judge who had presided over Wright's plea hearing. None of the witnesses recalled whether or not Wright had been advised of his *Boykin* rights. Based on this testimony, the court ruled that it could *not* conclude that Wright had been advised of his rights at the plea hearing.

Despite this ruling, the state court denied Wright's habeas petition. The court concluded that "it is clear from [the defense attorney's] testimony, and the Defendant's prior record, that Defendant was aware of his constitutional rights when he pled guilty." This state court finding is not fairly supported by the record. 28 U.S.C. § 2254(d)(8).

With respect to the privilege against self-incrimination, Wright's attorney testified that he and Wright had discussed the advantages and disadvantages of Wright taking the stand. The attorney did not testify that he advised his client of his right not to testify; on the contrary, he stated that he had not specifically informed Wright of any of his *Boykin* rights. Wright might well have believed that he could have been compelled by the Government to take the stand.

With respect to the right to trial by a jury, Wright's attorney testified that he discussed with Wright the effect certain evidence might have on a jury, and what the jury might or might not do. Wright could have inferred from these discussions that he had the right to a jury trial, but he could also have believed that the Government would decide whether or not a jury would be used.

Finally with respect to the right to confront one's accusers, Wrigh attorney did not testify that he had ever discussed with Wright the f that the Government's witnesses would have to appear at trial and cross-examined. Although Wright had attended a preliminary heari at which witnesses were cross-examined, there is no indication on t record that Wright knew he had the right to engage in similar cro examination at trial.

The state court's reliance on Wright's "prior record" w misplaced. Wright's two prior felony convictions apparently result from guilty pleas rather than trials at which the *Boykin* rights mig have been exercised. The record does not show whether Wright w advised of his rights at the time of his prior guilty pleas, or whether t prior pleas were sufficiently close in time so that Wright would ha remembered his rights if he had been advised of them.

Because the state court's findings were not fairly supported by t record, the district court should hold a new hearing and make its o findings on the merits of Wright's habeas claim. *See Stone Cardwell*, 620 F.2d 212, 213 (9th Cir. 1980). We remand for such hearing.

REVERSED AND REMANDED.

RECORDER-SUNSET PRESS, SAN FRANCISCO, CA 8-31-81—550

Opposition

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 81-1512

RECEIVED
APR 29 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

EARL B. DOWDLE, Superintendent,
Safford Conservation Center; and
Attorney General, State of
Arizona,

Petitioners,

vs.

EMIL THOMPSON WRIGHT,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, EMIL THOMPSON WRIGHT, pursuant to Rule 53, Supreme Court Rules and Title 18, United States Code, §3006(d)(6), respectively, moves this Honorable Court for leave to file the attached Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs and to proceed in forma pauperis. Counsel undersigned was appointed to represent the Respondent by the District Court on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

TOM O'TOOLE
Federal Public Defender
District of Arizona

FREDRIC F. KAY, Assistant
Federal Public Defender
P. O. Box 2710
Tucson, Arizona 85702
Telephone: (602) 792-6521
(FTS) 762-6521

Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 81-1512

EARL B. DOWDLE, Superintendent, Safford Conservation Center: and Attorney General, State of Arizona,

Petitioners,

vs.

EMIL THOMPSON WRIGHT,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EMIL THOMPSON WRIGHT
Respondent

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II. The limitations placed upon federal habeas relief by United States v. Timmreck are inapplicable in the instant case where the errors of the trial court were of constitutional dimensions. 9

III. The doctrine of latches is inapplicable in the instant case where this issue was not raised before the district court and where it was the states own lack of action and delay which resulted in greater difficulty in reconstructing the guilty plea. 13

IV. The Ninth Circuit did not err in remanding the instant case for a new evidentiary hearing . . . 15

V. Sufficient reasons have not been presented for this court to grant certiorari in the instant case. . 17

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INTRODUCTORY STATEMENT

On Februray 5, 1982, a Petition for a Writ of Certiorari was filed in this Court to review an order of the United States Court of Appeals for the Ninth Circuit (No. 80-5285) dated August 18, 1981.

This response in opposition to the Petition for Writ of Certiorari was requested by the Court in a letter to counsel for Respondent dated April 1, 1982.

FACTS:

Emil Thompson Wright pleaded guilty to first degree murder in the Superior Court of the State of Arizona on May 21, 1971. (CR 5, Exhibit, pages 115-116). At that time he was represented by a court appointed public defender, Gilbert Veliz. (RT 6). At that period of time, attorneys in Mr. Veliz' office each carried a caseload of over 100 felony cases. (RT 27-28). From the time of Mr. Veliz' initial appointment on Mr. Wright's case and the first trial date set (two months time or less), Mr. Veliz had thirty preliminary hearings and twelve cases that had been set for trial. (RT 27).

Mr. Wright was sentenced, on the same day he pleaded guilty, to a period of life in prison. Arizona Superior Court Judge John P. Collins presided at both the guilty plea and sentencing. (CR 5, Exhibit, pages 115-116). Mr. Wright began serving his sentence, and on July 21, 1977 he wrote the Clerk of the Pima County Superior Court requesting a transcript of his guilty plea and sentencing. (CR 5, Exhibit, page 121). On July 27, 1977, Judge Collins entered an order directing the court reporter to advise Mr. Wright of the transcript cost and to prepare a transcript at Mr. Wright's expense if requested

(CR 5, Exhibit, pages 119-120).

Apparently, nothing further happened until August 28, 1978, when Mr. Wright filed with the Arizona Supreme Court an application for a Writ of Habeas Corpus, a memorandum in support thereof, and a motion for appointment of counsel. Mr. Wright indicated therein that he had entered his guilty plea "without the trial court having first made a determination of voluntariness and intelligence of the plea." Mr. Wright also asserted that, after over one year from his original request, no one would provide him with a transcript of his hearing. (CR 5, Exhibit, page 123). On September 20, 1978, the Arizona Supreme Court ordered Mr. Wright's habeas petition transferred to the Pima County Superior Court where he had originally pleaded guilty. (CR 5, Exhibit, page 122).

Judge Collins "prevailed upon" Howard Kashman (who had been Veliz' supervisor as the public defender at the time the plea was entered) to take the court appointment. (RT 62-63; CR 5, Exhibit, page 137). On October 13, 1978, Mr. Kashman filed a motion for preparation of a transcript. (CR 5, Exhibit, page 136). After a second court order ordering the court reporter to prepare a transcript (CR 5, Exhibit, page 138), the court reporter, Jim Bouley, filed an affidavit saying that he could not locate his notes on the May 21, 1971 change of plea and sentencing. He further stated that he could not prepare a transcript without these notes. (CR 5, Exhibit, pages 139-140).

After Mr. Wright, through his court-appointed counsel, filed a supplemental memorandum in support of his application (CR 5, Exhibit, pages 141-148), and the prosecutor filed his opposition thereto (CR 5, Exhibit, page 153), an evidentiary hearing was held before Superior Court Judge Harry Gin on February 16, 1979. (CR 5, Exhibit, pages 159-161;

(RT 1-95). Mr. Wright stipulated that his testimony would be the contents of an affidavit previously submitted. (RT 76, 90). Four witnesses testified at this hearing: Gilbert Veliz, (RT 4); Jim Bouley, (RT 47); Judge Collins, (RT 61); and Mike Cochran (the prosecutor at the 1971 guilty plea) (RT 79).

GILBERT VELIZ

Mr. Veliz[1] testified that at the time of the 1971 guilty plea, attorneys in his office were carrying a caseload of over 100 felonies each. (RT 27-28). Mr. Veliz did not recall whether Mr. Wright had been advised of all his rights at the change of plea. (RT 19). In fact, when asked by the prosecutor whether or not Judge Collins had advised Mr. Wright of his Boykin rights, Mr. Veliz questioned, "which are the Boykin rights?" (RT 18).

Mr. Veliz also testified that Mr. Wright was hesitant to give a factual basis for the plea. (RT 19). When Judge Collins refused to accept the plea without a factual basis, Mr. Veliz had a short discussion with Mr. Wright, after which Mr. Wright "did admit the allegations in general terms, but not specifically admitting having killed Mr. Downy by shooting him in the head." (RT 19-20).

In addition to not remembering whether Judge Collins informed Mr. Wright of his Boykin rights, Mr. Veliz

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[1] Mr. Veliz had, at the time of the hearing, become a Superior Court Judge. For clarity, he will continue to be referred to as Mr. Veliz

felt that he, as Mr. Wright's counsel, had not gone over these rights with him:[2]

> "I did not--you know, a lawyer's function is different than that of a judge, and I would not have sat there and given him what has been referred to as his Boykin Rights, you know, and go over the list at that point.

(RT 42).

Despite the fact that Mr. Veliz could not remember if Judge Collins advised Mr. Wright of his Boykin rights and the fact that Mr. Veliz affirmatively testified that he had not gone over a list of these rights with his client, Mr. Veliz nonetheless felt that the "plea was voluntarily made, and intelligently made, and that he had been advised of the constitutional rights in the change of plea as much as anybody else was advised in those days." (RT 26).

After hearing Mr. Veliz' testimony, Judge Gin summed up the testimony, and Mr. Veliz concurred, that Mr. Veliz had no recollection of what happened in the courtroom at the time of the change of plea other than that it was a longer -- than -- usual proceeding and that Judge Collins did establish a factual basis for the plea. (RT 46).

JIM BOULEY

Bouley testified that he was the court reporter who had reported the May 21, 1971 change of plea and sentencing. He had worked for Judge Collins from 1965 to 1975 on approximately every third week and later every eighth week. (RT 52)

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[2] Contrary to counsel's statement at page 3 in the petition for writ of certiorari, Mr. Veliz never testified that he discussed Mr. Wright's right to a jury trial with him. Mr. Veliz only testified that he discussed with Mr. Wright the fact that a jury might acquit him (RT 12) and that a jury would have the task of determining a death penalty (RT 13).

Furthermore, although Mr. Veliz testified he discussed with Mr. Wright "the potential for him taking the witness stand" (RT 14), Mr. Veliz never testified that he had discussed with Mr. Wright his right to refrain from testifying.

Bouley testified that although he searched, he was unable to locate any notes of the May 21, 1971 proceedings and had no recall of the events. (RT 58). He could not even recall the length of time required for the change of plea.

Not only did he not recall the change of plea, he did not recall the Petitioner. (RT 51). It was further Bouley's testimony that Judge Collins at that time did not use a checklist in taking a change of plea but would talk at random with no pattern or sequence to his questioning and statements. (RT 59).

JOHN P. COLLINS

Judge Collins testified that he did not recall the plea proceeding and if he had seen Mr. Wright other than on this occasion in court, "I wouldn't have known him from a loaf of bread." (RT 12). Judge Collins testified that he did not use a checklist in taking a guilty plea and that he would not intentionally leave off the giving of any rights in any particular case. (RT 65, 66). Judge Collins went on to say, "I am not going to sit here and tell you that I remember that day, and remember that I did such, such, and the other, because I don't remember." (RT 66).

MIKE COCHRAN

Mike Cochran, the prosecutor in the 1971 plea proceedings, testified that he recalled "the hesitancy on the part of the defendant to admit the act." (RT 86). Mr. Cochran could not testify that he remembered every question being asked:

> I can't tell you that I specifically remember now each question being asked, but I do recall at that time going down my mental checklist of the things that had to be covered, and was satisfied at the end of the change of plea, that they were covered.

(RT 83).

On March 6, 1979, Judge Gin entered an order denying Mr. Wright's petition for post-conviction relief. In the minute entry, Judge Gin stated that he could not conclude from Judge Collins' testimony and that of the court reporter Jim Bouley that Mr. Wright had been advised of his constitutional rights at the plea proceeding. However, Judge Gin felt that the evidence as a whole showed that Mr. Wright was aware of his rights when he pleaded guilty and therefore, the plea was made knowingly, voluntarily, and intelligently. (CR 5, Exhibit, page 177). Judge Gin also denied Mr. Wright's motion for rehearing. (CR 5, Exhibit, page 182). Mr. Wright, through his defense counsel, filed a petition for review in the Arizona Supreme Court (CR 5, Exhibit, page 183) which was also denied. (CR 5, Exhibit, page 190).

After exhausting his state remedies, Mr. Wright filed for a writ of habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court. (CR 2, 3). The state admitted jurisdiction of the district court and admitted that Mr. Wright had exhausted his available state remedies with regard to the issues raised. (CR 5). On March 5, 1980, the U.S. District Court ordered Mr. Wright's writ denied and dismissed. Mr. Wright then petitioned for the appointment of counsel to appeal the district court's ruling. (CR 8). Present counsel was then appointed on March 21, 1980. (CR 9). Pursuant to a timely appeal, the Ninth Circuit on August 19, 1981 reversed and remanded the case to the district court for a new evidentiary hearing.

ARGUMENT

I. By admitting jurisdiction in the federal court for habeas relief and by admitting that the defendant had exhausted his state remedies, the state is foreclosed from raising these issues for the first time upon appeal.

Counsel for the state argues in his petition for a writ of certiorari that (1)under United States v. Timmreck, 441 U.S. 789 (1979), Mr. Wright's claim is not properly cognizable in habeas corpus; and (2) the doctrine of latches precludes federal habeas relief as well. Neither of these issues, however, was raised before the district court nor in the state's brief to the Ninth Circuit. The state raises them now in its present petition for writ of certiorari, not having given the lower courts the full opportunity to address either issue.

More telling than the state's apparent waiver of these issues by not raising them below is the prior admission by the state that this case was properly before the district court for habeas relief. In its October 31, 1979 response to Mr. Wright's petition for habeas corpus, the state admitted jurisdiction:

> "Admits the jurisdiction of the Court, and admits that Petition [sic] has exhausted the available state remedies with regards to the issues raised in his petition."

(CR 5).

The state's only challenge to Mr. Wright's petition was to assert that the plea was knowing, intelligent, and voluntary, and not without due process. (CR 5, Exhibit, page 12, Appendix 1).

Although counsel for the state sharply criticizes the Ninth Circuit for failing to address Timmreck, this case was never cited by the state in its brief to that court.

Although Timmreck was decided by this court five months prior to the state's first responsive pleading in 1979, the first time it was ever cited in any of the state's briefs or memoranda was in February of this year when the state brought the present petition.

Similarly, the state did not raise the latches issue before the district court or in its brief to the Ninth Circuit. Although the doctrine of latches, now codified into the Rules Governing Section 2254 Cases, is an equitable remedy requiring the exercise of discretion by the lower court, the state did not present this argument to the district court for its consideration. Now, over two years later, the state comes before this court formally raising the issue of latches for the first time.

Having failed to argue these two issues in its briefs and memoranda below, the state is foreclosed from raising them anew here. See e.g. Neely v. Eby Construction Co., Inc., 386 U.S. 317, 330 (1967). Furthermore, having conceded the exhaustion of state remedies and the jurisdiction of the district court below in its response to Mr. Wright's Petition, the state may not argue to the contrary for the first time here, Ramsey v. United Mine Workers of America, 401 U.S. 302, 312 (1971) (where this court was unsure whether an issue was presented to the District Court or Court of Appeals, it was deemed inappropriate to consider it in the first instance).

II. The limitations placed upon federal habeas relief by United States v. Timmreck are inapplicable in the instant case where the errors of the trial court were of constitutional dimension.

Counsel for the petitioners argues in his petition for writ of certiorari that the instant case "is virtually on all fours with" United States v. Timmreck, 441 U.S. 780 (1979).[3] In Timmreck, however, this court was concerned merely with "a formal violation of Rule 11," rather than the errors of constitutional dimension raised in the instant case.

In Timmreck, the trial judge failed to explain to the respondent a mandatory special parole term required by the applicable federal statute. This court found this omission in a guilty plea proceeding "neither constitutional or jurisdictional." and thus afforded no relief in the habeas proceeding. Timmreck, 441 U.S. at 783. This court reasoned that since the formal violation of Rule 11 was (1) not constitutional nor jurisdictional; (2) did not result in a complete miscarriage of justice; and (3) did not result in a proceeding inconsistent with the rudimentary demands of fair procedure, there was no basis for allowing collateral attack to do service for an appeal. Timmreck, 441 U.S. at 784.

In the instant case, however, the errors complained of are of constitutional dimension. In Boykin v. Alabama, 395 U.S. 238, 243 (1969), this court held that several federal constitutional rights "are involved in the waiver that takes place when a plea of guilty is entered:"

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[3] United States v. Timmreck, however, was not among the five cases cited in the state's brief below to the Ninth Circuit.

(1) the privilege against compulsory self-incrimination; (2) the right to trial by jury; and (3) the right to confront one's accusers. Boykin, 395 U.S. at 243. This court declined to presume waiver of these rights from a silent record. In so holding, this court said that when a judge discharges this duty, collateral proceedings are forestalled:

> "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may later be sought (footnotes and ciations omitted) and forestalls the spinoff of collateral proceedings that seek to probe murky memories."

Boykin, 395 U.S. at 243-244.

In charging trial judges that it was their duty to make sure that a defendant understands the nature of a plea and its consequences, this court suggested that inorder to insulate convictions from attack, the trial court would be advised to conduct an on the record examination of the defendant. Boykin, 395 U.S. at 244 (quoting Commonwealth ex rel. West v. Rundle, 428 Pa. 102, 105-106, 237 A.2d 196, 197-198 (1968).

In the instant case, the record is completely devoid of evidence that Mr. Wright was informed of the important constitutional rights he was waiving by entering a plea of guilty. His own trial counsel's answer to whether Mr. Wright was informed of his Boykin rights was "which are the Boykin rights?" (RT 18). The trial judge remembers nothing of the proceedings. (RT 62). Even the prosecutor admitted that he can not remember that every question was asked and that he merely used a "mental checklist" to make sure everything was covered. (RT 83). What both the defense and the prosecuting attorney did remember, however, was that Mr. Wright was most hesitant in admitting he committed the crime. (RT 86, 19). This perhaps was the

reason that the plea proceeding was longer than usual.[4]

This case clearly presents an appropriate one for habeas review. Mr. Wright was represented at the time of the plea by an extremely overworked public defender. At the time of the state hearing to review this plea proceeding, two of the witnesses were Superior Court judges from the same court as that judge who presided over the hearing. The attorney appointed to represent Mr. Wright in this matter was appointed by Judge Collins, the judge whose plea proceedings was under review. The attorney so-appointed had been Mr. Veliz' supervisor at the time Mr. Veliz represented Mr. Wright.

The federal court was clearly the only forum in which Mr. Wright's federal constitutional rights would be independently and adequately addressed.

In Henderson v. Morgan, 426 U.S. 637 (1976), the respondent pleaded guilty to second degree murder in the state court. He did not appeal, but five years later brought a collateral attack seeking to have his conviction vacated on the ground that his plea of guilty was involuntary. This court affirmed the district court's granting of habeas relief, stating:

> ". . .such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received real notice of the true nature of the charge against him the first and most universally recognized requirement of due process." (footnotes and citations omitted)

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[4] The Ninth Circuit has held that silence of the record on the Boykin waivers is enough by itself to shift the burden to the government to prove that the plea was voluntary and intelligent. United States v. Pricepaul, 540 F.2d 417, 423 (1976) See also Hart v. Eyman, 458 F.2d 334, 338 (9th Cir. 1972) (in a habeas case, the burden of producing the necessary record to enable the federal court to decide the case, is "clearly on the state""; Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir. 1975) ("in the face of an inadequate transcript at the time of a guilty plea's acceptance, the state must make a clear and convincing showing that the plea was in fact, knowingly and understandingly entered.")

Henderson v. Moran, 426 U.S. at 644-645.

The instant case is unlike Engle v. Isaac, 31 Cr.L. 3001 (No. 80-1430) (U.S. April 5, 1982) in which this court held that, absent a showing of cause and prejudice, a state prisoner who fails to comply with the state's contemporaneous objection rule may not bring a federal habeas action challenging for the first time the alleged constitutional error. In Engle, this court held that those defendants who had not objected to an allegedly unconstitutional jury instruction could not, without a showing of cause and prejudice, challenge this instruciton in a federal habeas action. In the instant case, Mr. Wright did exhaust all state remedies and did present his claim to the state courts for their post-conviction review. The state reached the merits of the case, finding Mr. Wright's petition properly before its courts. Moreover, the state admitted jurisdiction and exhaustion of all state remedies in its response to the habeas petition.[5] Clearly, if the state reaches the merits of a case, the contemporaneous objection rule of Wainwright v. Sykes, 433 U.S. 72 (1977) does not preclude federal habeas review. Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981).

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[5] Even assuming a "cause and prejudice" requirement in the instant case, Mr. Wright has made that showing as well. Obviously, the "cause" for not raising this claim on direct appeal was because he was never made aware of his rights during the guilty plea proceeding. An appeal from a guilty plea in Arizona must be taken within 20 days. Rule 31.3, Arizona Rules of Criminal Procedure. To fail to advise a defendant of his Boykin rights upon pleading guilty and then to require that the defendant discover on his own this error within 20 days would be a virtually impossible burden. Moreover, the prejudice arising from an involuntary and unintelligent guilty plea to first degree murder is inherent within a constitutional violation of this magnitude. See McCarthy v. United States, 394 U.S. 459, 471-472 (1969); United States v. Dayton, 604 F.2d 931, 939 (5th Cir. 1979) (en banc).

III. The doctrine of latches is inapplicable in the instant case where this issue was not raised before the district court and where it was the states own lack of action and delay which resulted in greater difficulty in reconstructing the guilty plea.

The doctrine of latches, incorporated into the Rules Governing Section 2254 Cases, Rule 9, was never raised before the district court and was not mentioned by the state in its brief to the Ninth Circuit. As an equitable doctrine, requiring the use of discretion, latches is the most inappropriate issue to bring before the United States Supreme Court without having raised it below. Not having presented it to the lower courts, it may not be raised for the first time in this forum. See Section I, of this response supra.

The state having been guilty of latches itself throughout this proceeding, it comes before this court with unclean hands asking for this equitable relief. Mr. Wright first asked for a transcript in the instant case on July 21, 1977. Although a court order was entered ordering this transcript, Mr. Wright waited for over one year without hearing anything from Judge Collins' court reporter. Mr. Wright was forced to file a petition with the Arizona Supreme Court on August 28, 1978, before any inquiry was made regarding the whereabouts of the transcript. It was not until November 3, 1978 that the court reporter Mr. Bouley filed an affidavit with the court indicating he could not find the notes of the plea proceeding. Mr. Bouley's affidavit indicated that in August, 1977 he spend 16 hours looking for the notes to no avail. There is no justification in the affidavit or elsewhere for Mr. Bouley's failure to so inform Mr. Wright prior to November 3, 1978. It took from July, 1977, to February, 1979, before a hearing was ever held to reconstruct this lost transcript. By this inaction on the part of the

state, almost two years went by during which memories further failed and post-conviction relief became all the more difficult for Mr. Wright to obtain.

The Ninth Circuit has commented at least once on the Arizona courts "lack of system and security governing the storage of court reporter's notes," Hart v. Eyman, 458 F.2d 334, 336-337 (9th Cir. 1972). In Eyman. five years transpired between a guilty plea in 1961 and a habeas proceeding in 1966. The Arizona Attorney General did not reveal to the petitioner until 1969 that the reporter's notes were lost. At the time of the 1972 decision of the Ninth Circuit neither a transcript nor a reconstructed transcript had yet been afforded the petitioner by the Arizona courts. Holding that the obligation to provide some clearly defined method by which the state prisoners could raise their claims of denial of federal rights devolved "upon the state and the state alone," the Ninth Circuit criticized the system for storage of reporters' notes:

> The reporter's testimony illustrates a laxity and lack of system and security governing the storage of court reporters' notes which, it seems to us, is generally prevelant throughout the American Court system. The reporter testified that some reporters' notes in her county are stored at seven different places. . . (citations omitted.)

Eyman, 458 F.2d at 336-337.

Although this issue was not presented to the district court, there is ample evidence in the record to justify a holding that any prejudice resulting from the delay in time was caused in the instant case by the state as well as by Mr. Wright. The state having failed to raise this issue below and thus having failed to carry its own burden in proving prejudice, cannot prevail in the present forum.

IV. The Ninth Circuit did not err in remanding the instant case for a new evidentiary hearing.

In remanding the instant case for a new evidentiary hearing, the Ninth Circuit carefully reviewed the state and district courts' conclusions as well as the testimony before the state court. It's memorandum opinion, although unpublished carefully examines the testimony and, from it, concludes that a new hearing is necessary.

None of the witnesses at the hearing testified that they could remember Judge Collins specifically informing Mr. Wright of all his Boykin rights. While Mr. Veliz noted that Mr. Wright had two prior convictions based upon guilty pleas, there is not evidence in the record that Mr. Wright was informed of his Boykin rights at these guilty plea proceedings. Mr. Veliz did testify that he talked with Mr. Wright about his taking or not taking the stand and about the effect certain evidence might have upon a jury, but he never testified that he told Mr. Wright of his right to a jury trial and right not to testify. In fact, Mr. Veliz noted that his role as a lawyer was much different from that of a judge in a guilty plea proceeding. He also noted that Mr. Wright was hesitant to admit his guilt.

In remanding this case for a new evidentiary hearing, the Ninth Circuit was most conservative in the relief it afforded Mr. Wright. It merely gave the state a second chance to meet its burden to show that the plea was voluntary and intelligent. In doing so, the Ninth Circuit followed its own precedent as well as that of this court.

In United States v. Pricepaul, 540 F.2d 417, 423 (1976) the Ninth Circuit stated that silence of the record on Boykin waivers shifts the burden to the government to

prove that the plea was voluntary and intelligent. See Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir. 1975). In remanding for a new evidentiary hearing, the Ninth Circuit in the instant case merely noted that the state had not met its burden.

The court also followed the directives of Sumner v. Mata, ___U.S.___ 101 S.Ct. 764, 770 (1981) that:

> "When Congress provided in §2254(d) that a habeas court could not dispense with the presumption of correctness embodied therein unless it concluded that the factual determinations were not supported by the record, it contemplated at least some reasoned written references to §2254(d) and the state court findings."

Citing 28 U.S.C. §2254(d)(8), the Ninth Circuit carefully noted its reasons why the state court finding was not fairly supported by the record.

While the state criticizes the Ninth Circuit sharply for ignoring Timmreck and numerous other "precedents", it is telling that only five cases were cited in the state's brief to the Ninth Circuit. Timmreck was not among these. Furthermore, the state has not pointed this court to any controlling precedent in any jurisdiction holding that a circuit court may not review a state court's findings in a §2254 proceeding to see that they are fairly supported by the record.

V. Sufficient reasons have not been presented for this court to grant certiorari in the instant case.

Counsel for the state has been unable to point to any case in either the circuit courts or this court which the instant opinion from the Ninth Circuit contradicts. While the state has pointed to many recent cases attempting to limit habeas relief in the federal courts, the instant case does not specifically fall within any of their proscriptions.

Here, there was clearly an inadequate hearing before the state court. The judge whose plea proceeding was under review made the court appointment of counsel. The counsel he appointed was, at the time of the original plea, the supervisor of Mr. Wright's court appointed public defender. In other words, the counsel representing Mr. Wright at the state hearing on these issues was charged with arguing that at the time of the plea, one of the attorneys in his office failed to ensure that his client made a voluntary, intelligent plea. Moreover, the state judge presiding over this hearing concluded that despite the fact that there was insufficient evidence to conclude that Mr. Wright was informed by Judge Collins of his Boykin rights, he was nonetheless aware of them. This case is nothing more than a routine §2254 case in which the Ninth Circuit remanded for a new evidentiary hearing on the constitutional issue of voluntariness of a plea. As an unpublished decision, it has no precedential effect and will not serve to create conflicts among the circuits.

Assuming that this case raises questions regarding the scope of federal habeas review, it is inappropriate for certiorari because these issues were not raised before the district court or in the state's brief to the Ninth Circut. While Timmreck is not controlling in the instant case, the habeas issues it discusses were not briefed to the lower

courts. Neither the order of the district court nor the opinion of the Ninth Circuit addresses these habeas issues. This is perhaps because the state admitted in its response to Mr. Wright's petition that jurisdiction was proper and that state remedies had been exhausted.

The Ninth Circuit exercised habeas relief properly by providing the necessary dispassionate second look at a state's proceeding regarding important federal constitutional rights. It acted conservatively in carefully reviewing the evidence before the state court and in merely remanding for a new hearing. There being no special and important reasons for review on writ of certiorari, this petition should be denied.

Petitioner's Reply Brief

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EARL B. DOWDLE, Superintendent,
Safford Conservation Center; and
Attorney General, State of
Arizona,

Petitioners,

vs.

EMIL THOMPSON WRIGHT,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S ARGUMENTS

I. THE STATE IS NOT FORECLOSED FROM ARGUING EITHER UNITED STATES v. TIMMRECK OR THE DOCTRINE OF LACHES IN THIS COURT, BECAUSE BOTH MATTERS WERE RAISED IN THE COURT OF APPEALS.

Respondent's Opposition repeatedly urges that the state may not argue the applicability of United States v. Timmreck, 441 U.S. 789 (1979), because that case was not cited either in the state's response to the original petition for habeas corpus, or its answering brief before the Court of Appeals. While it is true that the state did not cite Timmreck on those occasions, this Court should not be misled into believing that the question of Timmreck's applicability was never placed before the Court of Appeals. Timmreck was repeatedly cited in Respondent's opening brief before the Ninth Circuit, in frantic efforts to distinguish it away. Moreover, as counsel for Respondent well knows, the applicability of Timmreck was one of the topics of oral argument before the Court of Appeals. There can be,

therefore, no question that the issue has been adequately raised below.

The situation is similar with the doctrine of laches. Subsequent to the filing of the briefs in the Court of Appeals but before oral argument, counsel for the state filed (pursuant to the Rules of Appellate Procedure) a list of eight additional pertinent cases. (See Appendix 1 hereto.) Three of those eight (Norvell v. Illinois, Mayola v. Alabama, and Clayton v. Blackburn) were specifically identified as pertaining to the effect of delay on the necessity of providing transcripts. Again, the issue was touched upon during the oral arguments. Hence, these matters are not being raised for the first time in this Court, and are legitimate grounds for decision./1

This conclusion is not changed by the state's concession that the Federal District

/1 If the Court is truly concerned about matters not being raised below, it should ignore the repeated attempts to suggest a conflict of interest on the part of the lawyer who represented Mr. Wright in his state post-conviction relief proceedings or the judge who presided over them. (See Brief in Oppostiion at 2, 11, 17.) That really is a question never raised before.

Court had jurisdiction over the original habeas petition and that state remedies had been exhausted. (See Brief in Opposition at 7-8.) An admission of a court's power to decide a case certainly does not imply any concession that it can either legally or equitably grant the relief requested, and Respondent's attempts to telescope these two very different questions into one can only be categorized as sophistry of the first water.

II. UNITED STATES v. TIMMRECK IS PROPERLY APPLICABLE TO THIS CASE.

Respondent seeks to eviscerate Timmreck by narrowly focusing on its reference to a "formal violation of Rule 11" while ignoring the total impact of the case. This Court effectively defined what it meant by a "formal" or "technical" violation by the very structure of the decision:

> Nor can any claim reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure". Respondent does not argue that he was actually unaware of the special parole term or that,

> if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the rule.
>
> 441 U.S. at 783 (emphasis added).

Thus, the Court seems to have defined a "merely technical" violation as one so slight that if the defendant had been properly advised it would not have affected his decision to plead guilty. This case is precisely like Timmreck in that Respondent has never argued "that he was actually unaware of [his Boykin rights] or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." His stance from the very beginning has only been that he was not informed by the judge, not that he did not actually know. (See his affidavit, reproduced as Appendix I to the Petition for Writ of Certiorari.) He clearly was willing to plead under almost any circumstances in order to obtain a life sentence. Therefore, he has presented at most only a "technical violation", insufficient to warrant any relief.

It should perhaps be reemphasized that

(contrary to the Brief in Opposition at 10) the state believes the record does contain evidence that Respondent had been informed of the rights he was waiving, by his own counsel if not by the trial judge. (See the Petition for Writ of Certiorari at 2-6, 25-30.) The former defense lawyer's question about "which are the Boykin rights?" does not indicate ignorance of them (See Brief in Opposition at 3, 10); much like Federal Rule of Criminal Procedure 11, the Arizona rules now require discussion of substantially more than the naked triad of Boykin rights. See 17 Ariz. Rev. Stat. Ann., Rules of Criminal Procedure, Rules 17.1 -- 17.4. It is not, therefore, surprising that a simple reference to Boykin did not raise instant recall of the specific contents of that decision.

III. THE DOCTRINE OF LACHES IS PROPERLY APPLICABLE TO THIS CASE.

As noted in Section I., supra, the doctrine of laches was raised in the Court of Appeals, so it can be considered by this Court, and the facts indicate that the doctrine should be

applied to preclude Respondent's claim. Contrary to the Brief in Opposition at 12, n.5, the time for appeal under Arizona law when Respondent pleaded guilty was 60 days, not the current 20 days. (1956 Rules of Criminal Procedure, Rule 348.) More importantly, the record is clear that Respondent was informed of his appeal rights. (See Appendices 2 and 3 hereto.) Besides, he was represented by counsel. Therefore, he is without excuse for his failure to do something about his claim of error.

Finally, despite Respondent's efforts to obfuscate the situation (Brief in Opposition at 13), the fact remains that the overwhelming bulk of the time which elapsed between Respondent's conviction and the hearing to reconstruct the record is directly chargeable to him alone. He simply sat and did nothing for more than six years. (May 21, 1971 to July 21, 1977.) The record shows no response to his July 1977 letter about transcripts, but there may well have been one, because his state habeas corpus petition states quite emphatically that he

"now finds that there is no transcript..." In any event, that state petition was not filed until August 8, 1978, over a year after his letter of inquiry, which hardly indicates a burning sense of urgency on Respondent's part. Once that petition was filed, matters moved along with reasonable speed: counsel was appointed, a second search for the hearing notes was made, memoranda were exchanged (one from Respondent's counsel being two weeks late), a change of judge effected, and an evidentiary hearing held, all within eight months (the hearing being held on February 16, 1979). After seven years of delay by Respondent, the eight months of rather normal proceedings required to get to the evidentiary hearing (not all of which is itself ascribable to the state) fades into insignificance. The bottom line is that Wright himself caused whatever prejudice might have been engendered by the lapse of time, and the Ninth Circuit was wrong to put the burden on the state.

CONCLUSION

Both the state court and the District Court found that Respondent did know the rights he was waiving and that the guilty plea was valid. This Court demands a reasoned basis for rejecting such factual conclusions. Sumner v. Mata, __U.S.__, 101 S.Ct. 764, 770 (1981) (Sumner I.) However, as appears to be the wont of the Ninth Circuit (see Sumner II., No. 81-844, 30 Crim.L.Rep. 4253, (U.S. March 22, 1982)), a wholly unreasonable standard was applied in order to reject the findings of the lower courts. The Court of Appeals should be reversed and its abuse of its authority corrected.

Respectfully submitted,

ROBERT K. CORBIN
The Attorney General

Bruce M. Ferg

BRUCE M. FERG
Assistant Attorney General
Attorneys for Petitioners

Appendix

ATTORNEY GENERAL
Southern Arizona Office
403 W. Congress
Tucson, Arizona 85701

Robert K. Corbin

February 27, 1981

Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

RE: Supplemental authorities pertaining to Wright v. Dowdle, CA-CIV 80-5285 (DC CIV 79-270 TUC MAR)

Dear Sir:

In accordance with the Federal Rules of Appellate Procedure, Rule 28 (j), Respondents-Appellees submit the following list of pertinent and significant authorities which have come to the attention of counsel undersigned since the filing of the Answering Brief. This case is set for oral argument on March 10, 1981.

1. Sumner v. Mata, No. 79-1601, (U.S. Supreme Court, January 21, 1981) - pertains to degree of deference to be paid to findings of fact by a state court (see Answering Brief at 2; Reply Brief at 1).

2. Norvell v. Illinois, 373 U.S. 420, 83 S.Ct. 1366 (1963) - pertains to constitutional requirement for provision of trial transcript to petitioner, especially where request delayed.

3. Grantling v. Balkcom, 632 F.2d 1261 (5th Cir. 1980) - pertains to deference to be paid to state court finding that guilty plea

was knowing and voluntary (see Answering Brief at 2; Reply Brief at 1).

4. Rawls v. Mabry, 630 F.2d 654 (8th Cir. 1980) - pertains to correctness of finding that guilty plea here was voluntary (see Answering Brief, Argument II), especially with regard to extent of discussion of charge (see Opening Brief at 15).

5. Bouchillon v. Estelle, 628 F.2d 926 (5th Cir. 1980) - pertains to evidence admissible to show proper advisement of rights (see Opening Brief at 11-12, Reply Brief at 6-7).

6. Alessi v. United States, 628 F.2d 1133 (2d Cir. 1980) - same pertinence as Bouchillon.

7. Mayola v. Alabama, 623 F.2d 992 (5th Cir. 1980) - pertinent to necessity to provide transcript after unreasonable delay in request by petitioner.

8. Clayton v. Blackburn, 578 F.2d 117 (5th Cir. 1978) - pertains to necessity to provide transcript after unreasonable delay in request, voluntariness of counselled guilty plea, and deference to state court findings.

Sincerely,

"/s/ Bruce M. Ferg"

Bruce M. Ferg
Assistant Attorney General
Criminal Division

BMF/rm

Copy mailed this
27th day of February, 1981
to: Fredric F. Kay
Asst. Federal Public Defender
P.O. Box 2710
Tucson, Arizona 85702
(Counsel for Petitioner)

IN THE SUPERIOR COURT OF THE

STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

JOHN P. COLLINS
JUDGE, of the
Superior Court

NO. A-18997

DATE May 21, 1971

STATE OF ARIZONA,
PLAINTIFF

James W. Cochran
PLAINTIFF'S ATTORNEY

EMIL THOMPSON WRIGHT,
aka Lawrence Wright,
DEFENDANTS

Gilbert Veliz
DEFENDANTS' ATTORNEYS

MINUTE ENTRY
CHANGE OF PLEA & SENTENCING:

Deft. present.
James Bouley reporting.
The State moves to amend Count One of the Information to read "Murder, First Degree."
The Court questions Deft.
There being no objection,
IT IS ORDERED that the motion is granted and that Count One of the Information be amended to charge Deft. with "Murder, First Degree."
Deft. moves to withdraw his plea of "Not Guilty" previously entered to the original open charge of murder in Count One of the Information.
The Court questions Deft.
IT IS ORDERED that the motion is granted and that Deft's plea of "Not Guilty" previously entered to Count One of the Information be withdrawn.

Deft. enters a plea of "Guilty" to "Murder, First Degree," as charged in Count One of the Information as amended.

The Court finds that the plea is made freely and voluntarily.

Deft. waives the statutory time for sentencing.

B. CHADWICK, Deputy Clerk

FILED

May 21, 1971
FRANCES C. GIBBONS, CLERK
By "/s/ B. Chadwick"
Deputy

IN THE SUPERIOR COURT OF THE

STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff, vs. EMIL THOMPSON WRIGHT, aka Lawrence Wright, Defendant.	)	No. A-18997 JUDGMENT AND COMMITMENT Plea of Guilty to: MURDER, FIRST DEGREE, Count One

On this 21st day of May, 1971, the defendant being present in open court, in person and by counsel, Gilbert Veliz, and the deputy county attorney, James W. Cochran, being present on the part of the State, and this being the time heretofore fixed for passing judgment on the defendant, the defendant was informed by the Court of the nature of the Information/filed charging the crime of as amended MURDER, FIRST DEGREE, Count One committed on or about the 22nd day of January, 1970; also of the arraignment and plea of "Guilty" as charged in the Information/on the 21st day of May, 1971. as amended

The defendant being asked to show legal cause why judgment should not be pronounced at this time, and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment, that, WHEREAS, you EMIL THOMPSON WRIGHT, aka Lawrence Wright, having pled guilty in this Court to the charge of MURDER, FIRST DEGREE, Count One it is found

by the Court that you are guilty of said crime. Therefore,

IT IS ORDERED, ADJUDGED AND DECREED, and the judgment and sentence of the Court is that you EMIL THOMPSON WRIGHT, aka Lawrence Wright be punished by imprisonment in the State Prison at Florence, Arizona, for [illegible] life [illegible], to date from May 21, 1971, and defendant is remanded to the custody of the Sheriff of Pima County, Arizona, to be by him delivered into the custody of the proper officers of said State Prison.

IT IS FURTHER ORDERED that a certified copy of this Judgment shall be a sufficient warrant for said Sheriff to take, keep and safely deliver the said EMIL THOMPSON WRIGHT, aka Lawrence Wright into the custody of the proper officers of said State Prison, and a sufficient warrant for the officers of said State Prison to keep and imprison the said EMIL THOMPSON WRIGHT, aka Lawrence Wright in accordance herewith.

Thereupon, the defendant, in open court, was advised by the Court of the right to appeal, of the time in which notice of appeal may be filed and of the right to have counsel to prosecute the appeal, and, if indigent, of the right to appointed counsel and the right to be furnished, without cost, a copy of the record and reporter's transcript for appeal purposes.

"/s/ John P. Collins"
J U D G E

(Prison) 18-1

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The Court sets this as the time for sentencing.

This being the time set for sentencing, and no legal cause having been shown why sentence should not be passed at this time, and Deft. having pled guilty to "Murder, First Degree," as charged in Count One of the Information as amended,

IT IS THE JUDGMENT OF THE COURT that the Deft. is guilty of that charge.

IT IS THE FURTHER JUDGMENT AND SENTENCE OF THE COURT that the Deft. be sentenced to the Arizona State Prison for life, commencing today, May 21, 1971.

The Court advises the Deft. of his appeal rights.

On motion of the State, and there being no objection,

IT IS ORDERED that Counts Two and Three of the Information are dismissed.

cc: County Attorney
Public Defender

B. CHADWICK, Deputy Clerk